IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

CRL.A.No. 630 of 2003(C)

SC.227/1999 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE (ADHOC), KALPETTA.

APPELLANT: ACCUSED

MOHANAN @ UNNI S/O. KUMARAN,
POOVANIKUNNEL HOUSE, EDATHARA, NOOLPUZHA AMSOM,
MUTHANGA P.O., SULTHAN BATHERY

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT/STATE

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1. SUB INSPECTOR OF POLICE, SULTHAN BATHERY

2. STATE-REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-10-2007 , THE COURT ON 11/10/2007 DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 630 of 2003

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Dated this the 11th day of October, 2007

JUDGMENT

Appellant challenges the judgment in S.C. No. 227/99 on the file of the Court of the Addl. Sessions Judge (Adhoc) Kalpetta. By the impugned judgment the appellant was found guilty under section 55(a) of the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for a period of three months.

2. The prosecution case against the appellant is that on 29-4-1998 at 7.30 p.m. he was found in possession of three litres of illicit arrack in a plastic can and with a glass at Edathara in contravention of the provisions of the Abkari Act and thereby committed the offence under section 55(a) of the Abkari Act. He was arrested at the spot and MO1 can and MO2 glass were seized. As per Ext.P1 mahazar, sample was also taken for analyzis. To prove the prosecution case, PWs.1 to 7 were examined and Exts.P1 to P5 and MOs.1 and 2 were marked. When the appellant was questioned under section 313 Cr.P.C., he denied the allegation. Considering the entire evidence, the trial court found that the prosecution had proved beyond any

reasonable doubt that the appellant had possessed illicit arrack for sale and hence he committed the offence under section 55(a) of the Abkari Act .

3. In this appeal the learned counsel for the appellant challenges the judgment on the following grounds:- Firstly, it is contended that the trial court ought not have relied on the evidence of the official witnesses to find the appellant guilty of the offence. Secondly, it is contended that PW1 had not followed the procedure prescribed for seizing the contraband article and taking the sample as per the provisions of the Abkari Act and the Kerala Excise Manual. Lastly it is contended that in the light of decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631) , the finding of the trial court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is not tenable.

4. The evidence of PW1, Circle Inspector of Police would show that on 29-4-1998 while he was on law and order duty he found the appellant at Edathara with a plastic can containing illicit arrack, he arrested the appellant and seized the plastic can and glass. He took sample, seal it and affixed label containing the signatures of the appellant and the witnesses. It has come out in evidence that the property seized produced before the court on the next day itself. Ext.P5 chemical analysis report

would show that the sample contained 33.52% ethyle alcohol by volume. Hence, the contention of the learned counsel that PW1 had not followed the procedure prescribed for seizing the contraband article and taking the sample as per the provisions of the Abkari Act and the Kerala Excise Manual is not sustainable.

5. Though PWs.2 and 3 independent witnesses were cross-examined by the defence counsel at length, their evidence has not been shattered. They admitted their signature in Ext.P1 and in the label on MO1. They were declared hostile to the prosecution. PWs.5 and 6 had admitted their signature in Ext.P3 scene mahazar. The trial court mainly relied on the evidence of official witnesses to find the appellant guilty under section 55(a) of the Abkari Act. There is no legal bar to prove the case through the evidence of official witnesses, if their evidence is free from infirmity. The trial court found that PWs.1 and 4 had given evidence in consistent with Ext.P1 seizure mahazar and Ext.P2 FIR. PWs.1 and 2 had given evidence before the court that the appellant was found in possession of MO1 can which contained 5 litres of arrack. Though these witnesses were cross-examined at length, their evidence has not been shattered. In the above circumstances, this Court is of the view that the trial court is fully justified

in relying on the evidence of the official witnesses to find the appellant guilty of the offence.

6. Next question to be considered is that as per the principle laid down in Surendran's case (Supra) and Sudhepan's case (Supra), the finding of the trial court that the appellant committed an offence punishable under section 55(a) of the Abkari Act is not sustainable. In In Surendran 's case (Supra) a Division of this Court held that when a person is in "possession of illicit liquor" while illegally importing it, the case would be covered under section 55(a) of the Abkari Act and in a case where the possession is of illicit liquor the case would fall within section 58 of the Abkari Act. In Sudhepan @ Aniyan (Supra) this Court held that under section 55(a) the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. As per the provisions of the Abkari Act, the prosecution should prove that the article was found in possession of the accused was in connection with export, import, transport or transit of liquor. In the light of the above, this Court is of the view that the finding of the trial court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is not sustainable. After considering the entire evidence, the trial court found that the prosecution had proved that the appellant was

found in possession of three litres of arrack.. The prosecution in this case has not proved that the possession of the contraband article was incidental or in connection with export, import, transport or transit of liquor. Section 8 (1) of the Abkari Act deals with prohibition of manufacture, import, export, transport, transit, possession, storage, sales, etc. of arrack. As per section 8(1) of the Abkari Act, no person shall manufacture, import, export, transport, without permit transit, possess, store, distribute, bottle or sell arrack in any form. Hence, offence under section 8(1) and (2) of the Abkari Act is, therefore, attracted in the facts and circumstances of this case. Therefore, the appellant is found guilty under section 8(1) of the Abkari Act, punishable under section 8(2) of the Abkari Act .

7. The next question to be considered is with regard to the sentence awarded against the appellant. The possession of arrack in contravention of the Act or of any rule or order made under the Act shall not be encouraged by giving smaller punishment. However, the fact that the incident happened during the year 1998 and the fact that the quantity of arrack is three litres, this Court is of the view that sentence of rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for three months under section 8(2) of the Abkari Act will meet the ends of justice. Hence, the appellant is sentenced

to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for three months. Benefit under section 428 Crl.P.C. is entitled to the appellant.

With the above modification, the appeal is dismissed.

K. Thankappan,
Judge.

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K. Thankappan,J.

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Judgment

11-10-2007